No. 281.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

PACIFIC COAST STEAMSHIP COMPANY, a corporation,
Appellant,

vs.

EBEN W. FERGUSON, ELIDA F. HOBSON, and JOHN COOK, co-partners, and doing business under the firm-name and style of Moore, Ferguson & Co.,
Appellees.

BRIEF FOR APPELLANT.

GEORGE W. TOWLE, Jr.,
Proctor for Appellant.

Section 1479, Civil Code, (referred to on page 36): "Where a debtor, under several obligations to another, "does an act, by way of performance, in whole or in "part, which is equally applicable to two or more of "such obligations, such performance must be applied "as follows:

"1. If, at the time of performance, the intention "or desire of the debtor that such performance should "be applied to the extinction of any particular obliga- "be manifested to the creditor, it must be so applied;

"2. If no such application be then made, the "creditor, within a reasonable time after such per- "formance, may apply it toward the extinction of any "obligation, performance of which was due to him "from the debtor at the time of such performance; "except that if similar obligations were due to him, "both individually and as a trustee, he must, unless "otherwise directed by the debtor, apply the perform- "ance to the extinction of all such obligations in "equal proportion; and an application once made by "the creditor cannot be rescinded without the consent "of (the) debtor;

"3. If neither party makes such application with- "in the time prescribed herein, the performance must "be applied to extinction of obligations in the follow- "ing order; and, if there be more than one obligation "of a particular class, to the extinction of all in that "class, ratably:

"(1) Of interest due at the time of the perform- "ance;

"(2) Of principal due at that time;

"(3) Of the obligation earliest in date of maturity;

"(4) Of an obligation not secured by a lien or col- "lateral undertaking;

"(5) Of an obligation secured by a lien or col- "lateral undertaking."

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Statement.

In October, 1894, libelant, the Pacific Coast Steamship Co., was engaged in business as a marine carrier of persons and property between ports in this State. It also, in connection with that business, controlled a warehouse at Moss Landing.

At that time respondents, Moore, Ferguson & Co., were engaged in the grain business, in San Francisco,

and had received an order for a lot of barley from the Howard Commercial Co., at San Diego. In looking about for barley with which to fill that order, respondents ascertained that Waterman & Co., of this city, had 2448 sacks of barley, in the warehouse of libelant at Moss Landing, which was for sale. Moore, Ferguson & Co., then opened negotiations with Goodall, Perkins & Co., the general agents of libelant in this city, to ascertain the terms upon which they could procure libelant to transport that lot of barley from Moss Landing to San Diego, and there deliver it to the Howard Commercial Company.

In response to inquiries, respondents were informed that the regular freight charge from Moss Landing to San Diego—that is, from the wharf at Moss Landing to San Diego—was $3.10 per ton of 2000 pounds, but that no grain originated at the wharf, and that there were probably back charges upon the grain, the exact amount of which was not then known at the San Francisco office, but which were designated as warehouse and railroad charges. Respondents then stated that the Howard Commercial Co. had a special rate, from libelant, of $2.50 per ton on their grain shipments from San Francisco to San Diego, and desired to know if the same rate could not be obtained from Moss Landing to San Diego. The reply, by libelant, was in the negative. Thereupon respondents inquired of libelant if an arrangement could not be made by which that lot of barley could be transported, by a vessel of libelant, from Moss Landing to San Diego, and there delivered to the Howard Commercial Co., libel-

ant receiving from Howard Commercial Co. $2.50 per ton, on delivery, and respondents to pay the balance due, on demand, in this city. To this it was replied that such arrangement could be made, provided it was understood that, as a condition thereto the sum to be paid, for such transportation and delivery, should be the sum of $3.10 per ton plus all transportation and warehouse charges existing upon the barley. This being, as alleged by libelant, agreed to, the barley was laden at Moss Landing, delivered in good order at San Diego, $2.50 per ton collected from the Howard Commercial Co., there, and demand thereafter made on respondents for the balance of the sum agreed to be paid—to wit: the sum of $1.85 per ton—amounting to the total sum of $251.15. Upon this demand being so made, respondents denied that the sum of $1.00 per ton for railroad transportation charges upon the barley, from Blanco to the warehouse at Moss Landing, had been included in the sum which was to be paid as a consideration for the transportation and delivery, as above stated, but admitted that the sum of 25 cents per ton storage charges upon the barley at Moss Landing had been so included. Upon receipt of the $2.50 per ton from the Howard Commercial Co. at San Diego, $1.00 per ton of the same was applied by libelant in discharge of the back charges upon the barley above referred to (page 21; and page 26, and page 30 of transcript); the whole was credited to Moore, Ferguson & Co., on account, and this suit brought to recover the balance due upon the special contract alleged.

Paragraph III. of the libel (page 3 of transcript),

is as follows: "That at and during all the times "herein referred to, libelant was the owner of, and "was in control of, that certain steam vessel named "'Bonita,' and that heretofore, to wit: on the 2d day "of November, 1894, said Moore, Ferguson & Co. "shipped on board said steamer 'Bonita,' at Moss "Landing, to be from said landing transported and "delivered to the Howard Commercial Co. at the port "of San Diego, all in the State of California, certain "merchandise, to wit: 2448 sacks of barley, marked "'96,' and weighing 271,510 pounds; and said Moore, "Ferguson & Co. then and there agreed, in con- "sideration that the same was so shipped and should "be so transported and delivered, to pay to libelant "the sum of $4.35 per ton of 2000 pounds for each "and every such ton of the same so shipped and "so transported and delivered. That at the time "aforesaid, to wit: the time said Moore, Ferguson "& Co. so shipped such barley, it was agreed by and "between said Moore, Ferguson & Co. and libelant, "at the special instance and request of said Moore, "Ferguson & Co., that such barley should be delivered "to the Howard Commercial Co. at San Diego, upon "the payment by said Howard Commercial Co. to "libelant, upon such delivery, of the sum of $2.50 per "ton of 2000 pounds for each and every such ton that "should be so delivered, which sum of $2.50 per ton "so to be paid should be credited as a payment, on "account, toward the payment of said sum of $4.35 "per ton agreed to be paid by said Moore, Ferguson & "Co., as above stated, the balance of such sum of

" $4.35 per ton, to wit: the sum of $2.10 per ton of " 2000 pounds, said Moore, Ferguson & Co. promised " and agreed, such delivery of said barley being first " made, to pay on demand to libelant."

The denials of the answer to this paragraph of the libel reads as follows:

"These respondents deny that, at the time and " place mentioned in the third article of said libel, " or at any time or place, or ever, or at all, these re- " spondents, or any of them agreed, either in con- " sideration that the said merchandise should be so " shipped, transported and delivered, or otherwise, " or at all, to pay to libelant the sum of $4.35 per ton " of 2000 pounds for each or any such ton of the same " to be shipped, or transported, or delivered, or any " sum exceeding $3.35 per ton of 2000 pounds." (Tr., p. 12.)

Admissions, and affirmative allegations, relating to the facts alleged in Paragraph III. of the libel also appear in the answer; but such we deem immaterial to our present purpose.

Paragraph IV. of the libel (page 4), reads as follows: " That thereupon, and thereafter, said barley, and all " thereof, was transported on said steamer, and on, " to wit, the 6th day of March, 1894, was delivered in " good order and condition to said Howard Com- " mercial Co., at said San Diego, *in full compliance* " *with the agreement above stated*, and there was paid " to libelant upon such delivery by said Howard Com- " mercial Co., and the same was accepted by libelant " *pursuant to the agreement with said Moore, Ferguson &*

" *Co.* the sum of, to wit: $339.38, being the sum of
" $2.50 per ton for each and every ton of 2000 pounds
" of such barley so shipped and so delivered."

The answer to this paragraph (page 4), is in the words following: "4. *They admit the allegations con-*
" *tained in the fourth article of said libel.*"

Paragraph VII. of the libel alleges (page 5), " That
" all and singular the premises are true and within
" the admiralty, and maritime jurisdiction of the
" United States, and of this Honorable Court."

There is no denial of these allegations. The answer also alleged a tender, of the amount respondents concede to be due libelant, before suit brought, and a payment of that sum into the registry of the Court.

Upon this state of the pleadings the parties proceeded to trial, and counsel for the libelant then claimed (pages 22-23), that the pleadings admitted all that was claimed by libelant. This was contested by counsel for respondents, and no direct ruling was made by the Court.

Upon the trial there was a conflict of testimony regarding the terms of the special contract alleged, such conflict being limited to the conversations had between the representatives of the respective parties relating to railroad charges on the grain. (See page 26 of transcript.)

The matter having been duly submitted, the Court, after deliberation, rendered its decision (pages 102-105), dismissing the libel for want of jurisdiction, in the Court, over the subject matter of the controversy. Thereafter a petition for rehearing was filed (pages

106-110), and granted, and the case re-argued and re-submitted. Thereafter the Court rendered its decision (pages 111-117), again refusing to pass upon, or determine, whether, or not, the special contract, relating to the transportation and delivery of the barley, was as alleged by libelant, the closing paragraph of the decision being as follows (pages 116-17): "I do not de-"cide whether Moore, Ferguson & Co. assumed the "railroad charges due on the barley, for transportation "from Blanco to Moss Landing, into order secure the "delivery of the grain at the usual rate at San Diego, "as claimed by libelants, as I deem the question of "land transportation not within my jurisdiction to de-"termine."

This last was the final decision in the case, upon which the Court made and entered its decree, from which this appeal has been taken.

Assignment of Errors.

Libelant specifies the following as errors committed by the learned Judge of the District Court:

(*a*). The refusal to decide the only issue made by the pleadings, to-wit: the terms of the maritime contract, relating to the transportation of the barley from Moss Landing to San Diego, alleged in the libel on file.

(*b*). The failure of the Court to find that there was, and is, due to libelant, upon the cause of action in its libel stated, the sum of $251.15 as in said libel alleged.

(c). The Court erred in awarding judgment for libelant in the sum of $115.39 only.

(d). The Court erred in holding that the special contract alleged in said libel, or any part thereof, or any matter involved in the making of such contract, was, or is, not within the jurisdiction of the District Court of the United States for the Northern District of California, to determine in this action.

(e). The Court erred in awarding judgment for respondents for their costs.

(f). The Court erred in holding that it was the intention of Moore, Ferguson & Co., that the $2.50 per ton paid by the Howard Commercial Co. at San Diego should be applied to the payment of a particular part of the sum due to libelant in the premises, that is, toward the discharge of $3.10 of the sum of $4.35 per ton due to libelant from respondents.

Brief for Appellant.

I.

Upon the first of the assignments of error, we submit that the learned Judge of the District Court was in duty bound to decide the issues made by the pleadings on file, if any issue was so made; and if the answer raised no issue, then to have awarded judgment in favor of libelant for the full sum demanded and for costs. That the libel is all that can be looked to to ascertain whether or not the Court has jurisdiction in a given case, and that for the purpose of that determination its allegations must be taken as true.

In this case the libel alleges a single maritime contract, a contract relating exclusively to a maritime service, to be performed for an alleged stipulated compensation. There is in the libel no reference, not the remotest possible, to any contract, or to any service not in the strictest sense maritime in character; not in the strictest sense of admiralty cognizance.

The answer does not, by any fact alleged, or in any way, raise the question of the jurisdiction of the Court in the premises. On the contrary, it alleges a payment into the registry of the Court of a lesser sum than that demanded by libelant, thereby, by implication, affirming that the Court had jurisdiction of the subject matter in controversy. Whence, then, comes that which shall divest the jurisdiction of the Court—debar it from deciding that libelant is entitled to the relief demanded?

The claim asserted is maritime. The answer, at the very most, only denies the justness of the asserted demand in its entirety. It admits that a portion of the amount for which judgment is demanded, which admitted amount includes a charge for storage, is due *upon the cause of action alleged*. (Transcript, p. 13.) If the payment of the storage charge (25 cents per ton, in addition to the regular freight charge, $3.10 per ton), constituted a single consideration for the contract and service, then, why may not the $1.00 per ton, railroad charges, have been also included in that consideration? The single issue is: Shall libelant have judgment for the amount demanded in the libel, or for the lesser amount conceded as due by the answer? The answer to

this question depends upon the terms of a parol contract relating exclusively to the conditions upon which the performance of a maritime service could be secured.

The service was performed in all respects as stipulated, and now the only question of difference is what was the consideration upon the faith of which that service was performed. Libelant asserts that a payment of $4.35 per ton was the stipulated consideration. Respondents assert, on the contrary, that $3.35 per ton only, was the consideration. This disputed question of fact it was the duty of the Court to determine in one way or the other, and that duty the Court has not performed. Instead, the learned Judge of the District Court has held that that controversy is not within his jurisdiction to determine. How has he reached so strange a conclusion?

It appears that the grain, transportation of which was desired, was in a warehouse situate at a distance from the parties who were negotiating for its transportation; that both negotiators were in ignorance of its condition, as being subject to "back charges" for transportation and storage, both or either. It was probable that there were such charges; it was possible that there were not. If there were such charges then to the extent that they existed they entered into the consideration of the parties to the contract. That such charges should be paid was one element of the consideration; that the regular freight charges, from Moss Landing to San Diego, should also be paid was another element of the consideration, and the two,

united and combined into one, constituted the single consideration to libelant for its special agreement to carry and deliver.

If the exact extent of the back charges upon the barley had been known to the parties at the time the contract was made, the memorandum of the contract would have been substantially as follows: $4.35 per ton, $2.50 per ton payable on delivery in San Diego, the balance, $1.85 per ton on demand in this city. The extent of the back charges not being known, the same result was reached by the agreement that $3.10 per ton and all back charges should be paid by respondents as the consideration for the special contract and service.

But a single contract was made; that related solely to the terms upon which the transportation and delivery of a single lot of barley could be secured. There was a single act to be done, and a single consideration for its performance. What constituted the elements of that single consideration can be of no consequence. It was, and was understood to be, a simple money payment. Two ways were open to the parties by which to state the extent of that payment: it could have been stated in dollars and cents, specifically and definitely, if known; or, being unknown, it could be stated, as it was stated, by reference to certain fixed facts which should determine, with equal certainty, the extent of the payment. There being but a single service and a single consideration for that service, we submit that it is entirely immaterial what may have been considered, by the parties to the con-

tract, in fixing the amount of the consideration that should be paid.

It should be borne in mind that the contract, in suit, related not to carriage in general — between Moss Landing and San Diego—and a delivery upon the full payment of charges, as is usual; but to the conditions upon which a particular lot of grain, then in the possession of libelant as warehouseman, would be carried and delivered upon a partial payment of the charges thereon only. The grain was held by libelant subject to a contract with the railroad company that had delivered it to libelant; that its charges for transportation—$1 per ton—should be paid that Company in the event that the barley was shipped to any point south of Moss Landing. (Tr., pages 32–34.) This being so, it was perfectly natural that the amount of that liability to the railroad, and storage charges, should be added to the ordinary freight rate when libelant was asked as to the terms upon which it would take from its warehouse, and deliver *that particular lot of barley* in San Diego; and it would be just as natural that the one desiring to secure the withdrawal of the barley from the warehouse and its delivery at San Diego should agree to pay the additional sum demanded, in order to secure such delivery. At all events a single act was stipulated for, and there was but a single consideration for the performance of that act. Exactly what that consideration, was is the question which it was the duty of the learned Judge of the District Court to decide; and the

failure to perform that duty is the basis of appellant's first assignment of error.

In the opinion of the Court first rendered (page 102), several authorities are cited to support its holding, that because the *conflict of testimony* here is whether respondents agreed to pay the back charges on the grain or not, that therefore the Court was without jurisdiction to determine that question. We think that an examination of those cases will show that they lend little support to the Court's position in the premises. As we read them, the question here under consideration was not involved in the decision of those cases.

The Belfast, 7 Wall., 624, presented the question whether a State could invest its Courts with admiralty jurisdiction.

The Hendrick Hudson, 3 Ben., 419, presented the question whether a floating hotel could be the subject of a salvage service.

Guerney vs. *Crockett*, Abbott, 490. presented the question whether a watchman on a vessel could enforce a lien for services, as watchman, in admiralty.

The John T. Moore, 3 Wood., 68, was like the last case.

The Murphy Tugs, 28 Fed., 429, presented the question whether a superintending engineer had a lien on the vessels.

The Pulaski, 33 Fed., 383, presented the question whether storage, as such, could be recovered in an Admiralty Court. It was held that it could not. But in that case the suit was for storage *eo nominee*.

The Richard Winslow, 67 Fed., 259, was, in principle, like the last. The suit was for damages to grain, *while held on storage.*

We have never contended that a suit for railroad transportation, or for storage, as such, was cognizable in admiralty, and it is not a little annoying that we should have been supposed to be so doing. But we have contended, and we do contend, that many elements may enter into, be considered by parties in making a contract, be merged in the consideration for that contract; and that when such is the case—as we claim has been the case, in the suit at bar—then, for all the purposes of that contract, they have lost their original character. An account stated, is a familiar example.

II.

The Court should, upon the pleadings and the evidence, have rendered judgment in favor of libelant for the amount demanded, $251.15 and interest and costs.

First. The pleadings, subdivision III. (pages 3 and 4), set forth the contract, and allege that the consideration to be paid was $4.35 per ton of 2000 pounds—$2.50 per ton by the Howard Commercial Co., on delivery of the barley, in San Diego, and the remainder, on demand, by respondents in this city. Subdivision IV. (pages 4), alleges a delivery in full compliance with the agreement alleged, and the receipt of the $2.50 per ton at San Diego pursuant thereto.

The allegations of subdivision IV. of the libel are all expressly admitted (page 14 of transcript).

It would seem that when it is admitted that a party has made full performance under an alleged contract —has in all things acted pursuant to the terms of that contract—that such admission carried with it an admission of the existence of the contract, the conditions of which had been performed. If we are right in this, then all that libellant demands is admitted by the answer.

Second. The evidence requires that libelant should have judgment for all that it demands. The negotiations were conducted by Mr. Cooper, representing libelant; and Mr. Ferguson and Mr. Cook, each acting separately, representing respondents.

In his opening statement, counsel for respondents said (page 26): "Your Honor will see the only "question at issue is, Was there anything said to "Moore, Ferguson & Co., at the time of this trans- "action, about railroad charges, or anything from "which they might take notice that there were rail- "road charges."

Upon this point Mr. G. H. Cooper, testified: "I "told him (Mr. Ferguson) our local rate from the "Landing to San Diego was $3.10 per ton of 2000 "pounds. * * * The rate of $3.10 per ton applied "only from Moss Landing to San Diego, though no "grain originated at Moss Landing; that there would "probably be charges on the grain from some point on "the Narrow Gauge Railroad to Moss Landing. (Page "27). Mr. Cook came down on Nov. 3rd, I think in

" the morning, about that matter. * * * I again
" spoke to him about the possibility of back charges
" on it. * * * He came down again the same
" afternoon and stated that he had found that his
" Company had charged Mr. Howard up with $2.50
" per ton only, and that is all they could charge Mr.
" Howard, no matter what the back charges might
" be on the shipment, therefore he would like us to send a
" telegram. I again spoke to him about the possibility
" of back charges. Mr. Goodall was present at the
" conversation. Everybody else had left; it was on
" Saturday afternoon * * * some time after
" 4 o'clock. I told him we had no record of the ship-
" ment. I did not know the number of sacks, and
" if he would advise me Monday morning about that
" we would telegraph. He came down, I think, the
" following Tuesday morning, and said he would like
" to have us telegraph. I again went over with him
" on the question of the probability of back charges
" from some point on the railroad to Moss Land-
" ing, and asked him, in view of that probability, did
" he wish us to telegraph to our agent to have the
" grain delivered at $2.50 per ton, collecting the bal-
" ance from his company here. He expressed his wish
" in the affirmative. A telegram was written by me,
" submitted to Mr. Cook, Moore, Ferguson & Co.'s
" representative, and sent. (Page 28–9). We have
" always collected at the rate of $1.00 per ton from
" Blanco to Moss Landing on grain going south."
(Page 36)

H. W. Goodall, testified for libelant. He said:

"I was a member of the firm in which I am now doing
" business, Piper, Aiden, Goodall & Co.

" Q. Were you in the office of Goodall, Perkins &
" Co. at any time when Mr. Cooper and Mr. Cook
" were having a conversation relating to the shipment
" of this barley?

" A. I was; one Saturday afternoon, after four
" o'clock. It is the custom of the Pacific Coast Steam-
" ship Company to close their office at four o'clock on
" Saturday. I think all the clerks, or the greater por-
" tion of them, had left the office. Mr. Cook came
" in. I was standing at the counter with Mr. Cooper
" at the time, and being there, I overheard the con-
" versation between Mr. Cook and him.

" Q. State so much of that conversation as you
" overheard at that time. * * *

" A. As far as I remember, Mr. Cook, representing
" Moore, Ferguson & Co., came in and wanted to ask
" Mr. Cooper if some arrangement could not be made
" whereby this grain could be delivered to Mr. Howard
" at the rate of $2.50 per ton; that they had arranged
" with him that all grain shipped by Moore, Ferguson
" & Co. to Mr. Howard should not be charged more
" than $2.50 freight. Mr. Cooper said, possibly there
" would be back charges, or railroad charges, at Moss
" Landing, which Moore, Ferguson & Co. would have
" to assume in order to secure the release of the grain
" at the usual rate at San Diego. He impressed that
" on Mr. Cook in my presence, and agreed with Mr.
" Cook to write out a telegram that evening, and Mr.
" Cook was to call in the following Monday morning

" with reference to the dispatch which was to be
" forwarded at that time.

" Q. That is the substance of the conversation, as
" you remember it?

" A. That is as I remember it, yes.

" Q. That is the only time you were present when
" this matter was referred to?

" A. The only time.

" *The Court*—Q. Nothing was said about railroad
" charges?

" A. Yes, there was.

" Q. What was said about railroad charges?

" A. Simply that there would probably be charges
" of the Narrow Gauge Railroad on this grain which
" would have to be assumed by Moore, Ferguson &
" Co. in order to secure the grain at San Diego at the
" usual rate.

" Q. Who said that?

" A. Mr. Cooper."

Mr. Edwin Goodall, a witness for libelant, testified that he was a member of the firm of Goodall, Perkins & Co.; that he remembered having the matter of this shipment of barley brought to his attention by Mr. Cooper; that the telegram was submitted to him before it was sent; that the relations between libelant and respondents had been, and were, friendly; and that respondents had, before this occasion, solicited accommodations from libelant which had been granted. (Page 42–43.)

Mr. E. W. Ferguson, a witness for respondents, testified that he was a member of the firm of Moore,

Ferguson & Co. (page 43); that he had a conversation with Mr. Cooper through the telephone with reference to this transaction; that the conversation was on the morning of Oct. 25 or 26, and was opened by him; that he said to Mr. Cooper, "that we had an inquiry "from the Howard Commercial Co. at San Diego for 50 "tons of barley; that I could not find any in San Fran- "cisco; that there was a lot at Moss Landing that was "available if a rate could be obtained by which it "could be shipped. The barley in the meantime had "been quoted to me at a price free on board at Moss "Landing." (Page 45.)

Later, Mr. Ferguson again called Mr. Cooper up on the telephone, and as he testified: "He (Cooper) said "that the rate on barley would be $3.10 from Moss "Landing to San Diego. (page 46.) * * * Later "in the same day by telephone the conversation (with "Mr. Cooper) was that I thought a trade had been "consummated for the barley. * * * The fourth "conversation had with Mr. Cooper on that very day "was after I completed the trade for the barley, on the "basis of his freight rate, and I telephoned Mr. Cooper "immediately that I had made the trade, and closed "it on that basis; and that as the Howard Commer- "cial Co. had a rate with them of $2.50 per ton from "San Francisco they knew no other rate and I had to "quote them on the basis of San Francisco rates; con- "sequently, as there was 60c per ton more on the barley "from Moss Landing to San Diego than from San "Francisco to Moss Landing, he should bill us the 60c "here, or we would send a check to the office, as they

" might desire, which was apparently satisfactory, and " so Mr. Cooper stated. Mr. Cooper then, however, " made the remark, 'There may be some advance " charges, or back charges.'" (Page 49.)

Mr. Ferguson states (page 59) that he did not visit the office of Goodall, Perkins & Co. at all.

Mr. John Cook, a witness for respondents, testified that he was one of the firm of Moore, Ferguson & Co. (page 63), and, further: "I requested Mr. Cooper to " telegraph his agent at San Diego to deliver this grain " to the Howard Commercial Co., collecting of him " the rate which he was entitled to from San Francisco, " $2.50 per ton, and we would pay him the difference " of 85c. This was late in the afternoon. * * * * " He (Cooper) said there might be some back charges " on that grain that he did not know the amount of " (page 69). I said to him that he (we) knew pre- " cisely what the back charges were, because he (we) " had obtained a negotiable warehouse receipt from " Waterman & Co., and the amount the warehouse had " earned up to that time, according to the specifica- " ions in the receipt, was 25c per ton. * * * " Then he referred to the subject of possibility of " freight from Blanco. " * * * He said there " might be some freight on that grain from Blanco. " My reply to him was, if there was any back freight " against that particular lot of grain, it would be so " specified on the warehouse receipt, because the ware- " house receipt was a negotiable instrument received " by bankers here as collaterals, and would be re- " ceived by any concern that was advancing money

" on property of that kind; and if there were back " charges it would be specified on the warehouse re- " ceipt, in order to constitute a lien against the grain.

" We discussed the matter pro and con: he main- " taining his position that there might be a freight " charge (page 70), and I claiming that it could not " be possible under the existing circumstances, accord- " ing to the terms of the warehouse receipt; and he " agreed to telegraph his agent at San Diego, and we " would pay him the difference of 85 cents per ton." (Page 71.)

On cross examination the witness testified as follows:

" Q. This conversation on the Saturday was the " final conversation between you and Mr. Cooper, as " you remember it, relating to the way in which freight " charge should be handled, was it?

" A. It was the final conversation, so far as I can " recollect it now. (Page 74.)

" Q. Did you understand that the matter was defi- " nitely settled on that afternoon?

" A. I did.

" Q. You say that on that afternoon Mr. Cooper " did refer to the facts that there might be other " charges than the wharehouse charges—these rail- " road charges?

" A. Back charges he specified first.

" Q. You say he spoke of Blanco. Are you familiar " with that country down there?

" A. No, sir.

" Q. Did you understand that Blanco meant a rail- " road charge?

" A. That was the intimation from his remark.

" Q. That was what you understood by it, was it " not?

" A. Yes, sir.

" Q. That Mr. Cooper then informed you that " there might be back railroad charges on this freight?

" A. Yes, sir.

" Q. That is what he meant to convey?

" A. That is what he meant to convey in the latter " part of his conversation.

" Q. And that is what you understood? (Page 75.)

" A. Yes, sir.

" Q. And then insisted that there could not be any " such charges?

" A. I did.

" Q. He, on the other hand, maintained his posi- " tion that he was fearful there was such a charge?

" A. Yes, sir; he said there was a possibility of it.

" Q. Yet you say in the face of that he agreed to " waive that possibility?

" A. He agreed to wire his agent at San Diego " to collect freight of Howard at the rate of $2.50 per " ton, and we were to pay the difference which " amounted to 85 cents. * * *

" Q. What argument did you use to induce him to " recede from his position, that there might be other " charges than those you stated?

" A. As I have already stated, I claimed that was a " negotiable warehouse receipt issued by their own " company, accepted by all grain dealers, and that if " there were any back charges at all, that constituted a

" lien against that grain, which would be so specified
" on the receipt. (Page 76.)

" Q. Is it not true that you, relying on your con-
" struction of that negotiable receipt, as you term it,
" said to yourself, 'It does not make any difference
" whether there was or not, they cannot collect from
" me, and I will pay the back charges?'

" A. Not necessarily.

" Q. And Mr. Cooper did not agree to accept the
" 85 cents. Were you not induced to agree that it
" should go forward on the general order standing
" (understanding), because of your reliance on your
" construction of the receipt?

" A. No, sir. I had discussed the subject thor-
" oughly with Mr. Cooper prior to this time, giving
" him a written memorandum of what we pledged to
" pay, and I did not depart from that understanding
" at all.

" Q. When was that memorandum given?

" A. That was at the second interview.

" Q. That was on the 27th of October?

" A. I think that was on the 27th. * * * (page
" 77).

" Q. How did this matter come up in the shape
" it did on this subsequent day in November, this
" Saturday afternoon. * * * Why did you not
" say to him (page 79) in that conversation, 'This has
" all been determined?'

" A. I did not say that in so many words; but the
" attitude which I assumed towards him, and my
" conversation with him, determined that.

"Q. You did not say to him, 'This matter has "been arranged before,' did you?

"A. I do not think I repeated those words.

"Q. Or anything equivalent to them?

"A. Or anything equivalent to them. * * * (Page "86.)

"Q. You think, then, this last conversation was "on November 3d, do you?

"A. My opinion is that it was quite a number of "days after I had delivered to Mr. Cooper the ware-"house receipt.

"Q. That had direct reference, did it not, to pro-"curing a telegram to be sent to deliver this grain on "payment of $2.50 a ton?

"A. That conversation had; yes, sir. * * *

"Q. That conversation brought up the exact condi-"tion on which such telegram would be sent, did it "not?

"A. Yes, sir.

"Q. And then it was that Mr. Cooper stated that "those back charges might exist?

"A. Yes, sir.

"Q. Then it was that it was arranged that a tele-"gram should be sent, with the understanding that "the balance of freight should be paid here? (Page "82.)

"A. The balance of the freight, together with the "storage.

"Q. And then it was, in connection with that, "that the discussion arose as to the probability of rail-"road charges, in addition to the freight charges and

" storage, about which the understanding arrived at,
" the difference existed between you and Mr. Cooper?

" A. As I have already stated, Mr. Cooper insisted
" that there might be back charges first. Then, when
" I explained to him about the warehouse receipt
" carrying the charges, he mentioned the freight pro-
" position.

" Q. The conversation grew out of the fact that
" there came a definite request for instructions from
" the office here, to the San Diego agent, to deliver,
" on receipt of $2.50 a ton?

" A. Yes, sir. * * *

" Q. Up to that time there had been no instruc-
" tions issued? You had procured no instructions
" from Goodall, Perkins & Co. to deliver that grain
" on receipt of $2.50 per ton at San Diego?

" A. Yes, sir; that was in harmony with our previ-
" ous arrangements.

" Q. I say, up to that time you had procured from
" them no instructions to their agent in San Diego?

" A. None that I am aware of." (Page 83.)

Mr. G. H. Cooper, being recalled, testified as follows:

" Q. Have you here the manifest of the steamer
" "Bonita," of this date?

" A. I have (producing); that is the manifest.

" *Mr. Towle*—The paper is entitled 'Manifest of cargo,
" November 2, 1894, from San Francisco to Moss
" Landing, to San Diego, per steamship "Bonita";
" Captain, P. Doran; Purser, J. J. Carrol; Shipper,
" Moore, Ferguson & Co.: Consignee, Howard Com-
" mercial Co.; from Blanco ex P. V. R. R.; marks, 96;

" pack ages, 2448 sacks of barley: weight, 271,510 lbs.;
" rate, $4.35; freight, $590.53; total, $590.53; 135 8-10
" tons, P. V. R. R., 271,510 lbs., at $1, $135.76; S. D.
" ⅛ of $454.77.' * * (Page 85.)

" Q. Have you any entry in other books in the
" office showing the carrying of a credit of this $1 to
" the railroad?

" A. Yes, sir.

" Q. Will you turn to those? * * *

" A. Here is a credit of the particular shipment in
" question to the railroad company.

" *Mr. Towle*—The entry which I offer in evidence
" now is on page 233 of freight book 90: 'Pacific Coast
" Steamship Company (page 86). Freight on cargo
" steamship "Bonita," voyage 419. From San Fran-
" cisco to San Diego and way ports and return. Sailed
" from San Francisco November 1st, 1894 Arrived
" in San Francisco November 9th, 1894. Entire charges
" on shipment, $590.53. From Blanco to San Diego.
" Credit P. V. R. R. 271,510 lbs. at $1, $135.76.' * * *
" (p. 87.)

" *Mr. Towle*—My question is, in making their charges
" for freight in the manifest, whether or not it is cus-
" tomary to specify separately advance charges, or
" whether it is all put in as a freight charge?

" A. Do you mean from Blanco?

" Q. Yes; Blanco, or anywhere? Where there are
" advance charges for transportation, before it comes
" into the possession of the Pacific Coast Steamship
" Company, and they forward it, do they render a bill
" for the whole amount, including the transportation

" or do they specify separately the advance charges?

" A. They specify separately the advance charges " when they have been advanced at the time and paid " over, when (page 89) it is not a through rate—been " actually advanced and paid over at the time.

" Q. Where it had not been, then what?

" A. Where it has not been paid over from Blanco, " it is customary to make the bill showing the rate " right from the original point of shipment to the des- " tination. * * *

" Q. So that the manifest in a shipment of that " character would not show the extent of the charge " from Blanco, for instance, to Moss Landing?

" A. No, sir.

" Q. It would all go in as the freight rate from " Blanco to San Diego?

" A. Yes, sir.

" Q. The adjustment as between the Steamship " Company and the Railroad Company would come " afterwards?

" A. Yes, sir. * * * (Page 90.)

" Q. You heard the testimony of Mr. Cook with " reference to your agreeing to accept 85c in full of all " transportation and warehouse charges on this grain, " and the surplus of freight 85c in excess of $2.50? " You heard his testimony on that?

" A. Yes, sir. * * * (Page 96.)

" Q. Supposing that Mr. Cook did make the state- " ment, which you say he (he says he) did, that they " would pay 85c in addition to the $2.50, did you re- " ply to that, that would be satisfactory to you, or any- " thing of that character?

" A. No, sir.

" *The Court*—Q. Did you, by your silence, give " consent?

" A. No, sir. I do not remember any such state- " ment or any such proposition on the part of Mr. " Cook—any specified amount mentioned.

" *Mr. Towle*—Q. When was the last conversation " with him, as near as you remember?

" A. November 6th.

" Q. Was that the day that the telegram was sent?

" A. Yes, sir.

" Q. Was he there at the time that telegram was " written?

" A. Yes, sir.

" Q. Was it submitted to him?

" A. It was.

" Q. And satisfactory to him?

" A. It was.

" Q. You heard the testimony of Mr. Ferguson " with reference to you agreeing to give that special " rate by telephone? Have you any recollection of " doing such a thing as that?

" A. My recollection is, in my conversation with " Mr. Ferguson I said I thought there would be no " objection to our delivering the grain at $2.50, and " collecting the balance of charges here from him— " from his company here. The final arrangements " were made with Mr. Cook. * * * (Page 97.)

" Q. Did you understand that any final arrange- " ment had been reached with Mr. Ferguson by tele- " phone?

"A. Not as to the proposition that we were to "deliver the barley at less than the ordinary rate.

"Q. Now, Mr. Cooper, when, in your mind, was "the question of the delivery of this grain at $2.50 at "San Diego, finally and definitely settled? At what "date? * * * (Page 98.)

"A. November 6th.

"Q. That is the date when the telegram was sent?

"A. Yes, sir.

"*The Court*—Q. This had been shipped on Novem- "ber 2d.

"A. Yes, sir.

"*Mr. Towle*—Q. Do you remember of any discus- "sion relating to the warehouse receipt and what was "shown upon that by Mr. Cook? You heard him "testify with reference to that?

"A. My recollection of that is that Mr. Cook "brought the warehouse receipt to our office and "handed it over to me, and I simply took it and took "it in the inner office, and the letter was written to "our agent on the same date, October 27th, enclosing "that receipt.

"Q. Do you recollect any discussion between Mr. "Cook and yourself with reference to what appeared "on that warehouse receipt as charges against this "grain?

"A. Yes, sir.

"Q. You heard him testify that that matter was "discussed?

"A. I remember him saying something about "there being a 25c storage charge.

"Q. Do you remember anything as to the discus-
"sion relative to other charges as stated by Mr. Cook?

"A. Do you mean with reference to the possible
"railroad charges?

"Q. Yes. (Page 99.)

"A. I remember stating that possibility to him on
"two occasions very explicitly and definitely.

"Q. Did you, in any conversation, recede from
"that?

"A. No, sir. As to my answer about November
"6th, perhaps I might explain that somewhat. I
"stated that November 6th was when I definitely un-
"derstood it to be settled that the barley was to be
"delivered at $2.50. On November 3d, in the after-
"noon, I told Mr. Cook that if he would telephone us
"the number of sacks, and so forth, the data, on the
"following Monday morning, I would arrange to have
"such a telegram sent. It might have been considered
"settled at that time. Mr. Cook came down on the
"following Tuesday morning and we re-opened the
"question; so November 6th was the date on which it
"was finally and definitely settled." (Page 100.)

The evidence, above referred to, shows that the usual charge upon the lot of barley in question was $4.35 per ton. Had there been no negotiations looking to the delivery of the grain at San Diego, upon a payment there of $2.50 per ton only, the whole $4.35 would have been collected on delivery, and as a matter of course.

In this state of the case, respondents applied to libelant for an accommodation, that is, the privilege of having the barley delivered to their consignee upon

a payment by him of $2.50 per ton, respondents to pay the balance due.

There can be no question but that the sum of $4.35 per ton was due to libelant from respondents upon the delivery of that barley in San Diego, in the ordinary course of business. The barley was delivered there in good order. This, nothing more appearing, places the burden of proving payment squarely on respondents, and this regardless of whether the proof of such payment shall consist of a claimed actual payment in coin; a claimed release by operation of a new contract; or from a combination of the two. If a partial discharge is, as here, claimed to have resulted from a *special* contract, then the burden is on the one so claiming to prove the contract, as he alleges it, by a preponderance of evidence. That preponderance, in favor of respondents, does not exist in this case. On the contrary, we submit that the preponderance of evidence is easily with libelant.

From the testimony of Mr. Ferguson, above quoted, it appears that Mr. Cooper raised the question of "back charges," or "advance charges," immediately the question of delivery on payment of $2.50 per ton only was suggested.

The testimony of Mr. Cook, above quoted, shows that Mr. Cooper was insistent in that particular down to, and at, the time the telegram was sent to the San Diego agent to deliver upon receipt of $2.50 per ton. Mr. Cook says that at that time the barley had been shipped, and he also states that a definite understanding had been had, with Mr. Cooper, as to the exact

amount that should be collected upon the shipment, that is: that that amount should be the local freight rate plus 25 cents per ton storage charges; $2.50 per ton to be collected at San Diego and 85 cents per ton to be paid by respondents in this city—that the grain had been ordered shipped and had been shipped, by respondents, as the result of that express and definite understanding had with Mr. Cooper, days before the application was made to Mr. Cooper for the telegram. But, if this statement be the fact, how explain the failure of Mr. Cook to refer to the fact of such positive agreement when, as he says, Mr. Cooper was, for the first time, raising to him the question of railroad charges? If an understanding, definite to a cent, had been reached prior to the shipment, surely Mr. Cook must have referred to a circumstance so material at the time he applied for the telegram, and when, for the first time, as he claims, the question of possible railroad charges was raised by Mr. Cooper. What more natural than for Mr. Cook to have then said: "Why, " Mr. Cooper, this matter has all been definitely set- " tled between us: we had definitely arranged this mat- " ter, the exact amount that should be paid and how it " should be paid, before we ordered the grain shipped " at all. It is now too late for you to raise such a " question."

We say it is manifestly impossible that Mr. Cooper could have done as Mr. Cook now claims that he did—when the telegram was applied for—without Mr. Cook then making some reference to a prior definite understanding covering the matter, if there had been such

an understanding. And Mr. Cook testifies upon this point (page 80):

"Q. You did not say to him, 'This matter has "been arranged before,' did you?

"A. I do not think I repeated those words.

"Q. Or anything equivalent to them?

"A. Or anything equivalent to them."

We repeat, that had there existed the definite understanding, to a cent, relating to the charges upon that shipment, which Mr. Cook asserts, he must have made some reference to that fact when he applied for the telegram—and he did not, at that time, refer to it.

The attitude of Mr. Cooper appears to have been consistent throughout. He was constantly calling the attention of Moore, Ferguson & Co. to the fact that they might be assuming the payment of a railroad charge for transportation upon this grain, if they proceeded as suggested. That they must assume the payment of that charge, if there was one, to secure delivery at San Diego on the payment, there, of $2.50 per ton. From this position he is shown to have never receded. Moore, Ferguson & Co., on the other hand, appear to have had a contract with Waterman & Co., from whom they purchased the barley, that the price to them, from Waterman & Co., should be "free on board" the vessel, at Moss Landing; that is, that Moore, Ferguson & Co. should deduct from the price of the barley the amount of all back charges upon the grain. That Moore, Ferguson & Co. did deduct the sum of 25 cents per ton storage, appears from the evidence; and that sum they concede is due libelant

under the terms of the special contract alleged in the libel. For some reason they appear not to have taken into account in their settlement with Waterman & Co., the fact that there were back railroad charges upon the grain. But if they were careless in that respect, it furnishes no good reason for holding that libelant should now make good to them the loss resulting from such carelessness—especially not, when, as here, it appears that libelant was constantly putting them upon notice that such charges might exist.

Reliance, in this matter, seems to have been inadvertently placed, by Moore, Ferguson & Co., upon the terms of the special contract, designated by Mr. Cook a warehouse receipt, a transcript of which appears on pages 66 and 68 of transcript.

That paper *is a special contract relating to the shipment* of the barley in question *to San Francisco*, when required by the owner, and its storeage at Moss Landing pending the time it should be ordered forward.

A careless reading of that paper seems to have produced the impression in the mind of Mr. Cook that there could be no other back charges on the barley than the 25 cents a ton *storage*, specified therein—this, although Mr. Cooper was directing his attention to the contrary.

But, we submit, this throws a strong light upon the then mental attitude of Mr. Cook. Having a contract with Waterman & Co. that the grain should be delivered to him free of all back charges, he settles with them without ascertaining definitely the extent of such charges. Having so settled with Waterman &

Co. is it improbable to suppose that he was then equally willing to agree to assume a future payment of all back charges as a means of securing his special end in view? If he was then willing to *presently* pay money to Waterman & Co. upon his faith, based, as appears, upon that special contract, and in opposition to the expressed fears of Mr. Cooper (pages 69–71), then why should he not then have been equally willing to assume a future payment of a possible charge, which he was satisfied, in his own mind, did not exist; that being the only matter standing between him and the accomplishment of his object, that is, such agreement to pay being the consideration exacted for the delivery of the grain at San Diego, upon the payment of $2.50 per ton there.

If, therefore, the only question to be decided, from this evidence, is as stated by counsel for respondents in his opening statement (page 26), to wit: "The only question at issue is, Was there anything said to Moore, "Ferguson & Co. at the time of this transaction about "railroad charges or anything from which they might "take notice that there were railroad charges," then, we submit, the answer to that question must be in the affirmative. That our second specification of error should be now held to have been well taken.

III.

The fate of appellant's third specification of error, that "the Court erred in awarding judgment for libelant "in the sum of $115.39 only," must depend upon what has already been called to the Court's attention.

IV.

Appellant's specification of error *d* may raise a new question, that is, the effect of an application of payments as affecting the cause of action in this case.

For the purpose of our discussion under this head we may assume that two contracts *may* have existed between libelant and respondents—one, that respondents would pay to libelant the amount of back railroad and warehouse charges on the grain; the other, that it would pay libelant freight on the grain from Moss Landing to San Diego. That such obligations—contemporaneous in point of time—should be discharged as follows, that is, $2.50 should be paid libelant through the Howard Commercial Co., on delivery of the grain at San Diego, and the balance by respondents, on demand in this city, nothing being provided as to the special application which should be made of either of the payments provided for. In such case libelant, upon receipt of the payment of $2.50 per ton at San Diego, applied so much of that as was necessary in discharge of the obligation of respondents to pay the railroad and warehouse charges. This libelant was authorized to do, under sec. 1479 of the Civil Code, and such application was made by libelant (page 3), and then applied the balance of the sum so received in discharge of the obligation of respondents still existing. This being done, demand is made upon respondents for the balance due to libelant upon the still subsisting obligation. That demand is resisted by alleging that respondents never assumed the payment of the railroad charges, and, as a consequence of that,

that respondents were indebted to libelant in a lesser sum than that demanded. Suit is brought to recover the balance alleged to be due, and the libel counts on a maritime contract, alone; the answer raising no issue save as to the amount due libelant upon that contract. That amount can be determined only by first determining whether the moneys received had been properly applied, by libelant; that in turn only by determining whether respondents had agreed to pay the back charges, and if it were found that they had, then the amount of such back charges must also be determined before the Court could reach a proper determination of the single issue pending before it, to wit: Are respondents presently indebted to libelant in the sum demanded, as a balance due upon the performance of a maritime contract? To us, to state the case is to have fully argued it; and we confidently submit that the learned Judge of the District Court has fallen into error in holding that such matters, incidentally necessary to be determined, are, or that any one of them is, beyond the jurisdiction of the Court to so incidentally determine.

V.

The Court erred in awarding respondent's judgment for their costs (specification of error *e*), without having determined whether the sum tendered libelant by respondents, before suit brought, was the whole sum due.

There was, clearly, but one contract entered into be-

tween the parties—libelant had fully performed—a sum was due libelant from respondents. Demand was made for $251.15 in settlement of all existing demands, in the premises. This demand was met by a tender of the sum of $115.39 in full payment of all demands. If, in fact, the sum of $251.15 was due, from respondents to libelant, then, of course, the tender was not good, would not bar libelant from recovering its costs. This being so, how can respondents be entitled to a judgment for their costs in the absence of a determination that they had made a full tender of all that was due to libelant, in the premises; and the Court has expressly refused to so find.

VI.

The fate of appellant's specification of error *f* must depend, incidentally, upon the matters to which the Court's attention has already been directed.

The amount involved in this suit is small—so small that but for the principle involved libelant might, perhaps, better have submitted to the loss imposed, as the result of the decision by the Court below, than to have been to the expense attending this appeal—better than to have troubled this Court with the determination of a matter of so small immediate pecuniary concern. But appellant conceives that if the demand in suit may be split up in the way held by the District Court, that then very many contracts of marine affreightment may be—must be split up in the same

manner, and for similar reasons, to the necessary great loss and inconvenience of those whose business it is to make and perform such contracts.

Respectfully submitted,

GEO. W. TOWLE, Jr.,
Proctor for Appellant.